IN THE HIGH COURT OF UTTARANCHAL, NAINITAL.

No. 10- COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING.

[Chapter VIII, Rule 32(2) (b)]

Criminal Appeal No. 148/2002

Surendra Singh and another ... Appellants.

Vs.

State .. Respondent.

Decided on 15-09-2005

A.F.R. (Approved for Reporting)
~~Not Approved for Reporting~~

(Irshad Hussain, J.)

(B.S.Verma, J.)

Dated: 15-09-2005.

In the High Court of Uttaranchal, at Nainital.

Criminal Appeal No. 148/2002

1- Surendra Singh @ Bittu, S/o Mukhtar Singh,

2- Rajendra Singh S/o Mukhtar Singh,
Both are residents of Village Maholi Jungle,
P.S. Bazpur, District Udham Singh Nagar …. Appellants.

Vs.

State of Uttaranchal .. Respondent.

Sri M.S.Pal, Senior Advocate and Sri A.S. Gill,
learned counsel for the appellants.
Sri Amit Bhatt, learned A.G.A. assisted by
Sri Suhail A. Siddiqui, learned Brief Holder, for the State.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble B.S. Verma, J.

Dated: 15-09-2005

(Per: Hon'ble Irshad Hussain, J.)

Accused Surendra Singh alias Bittu and Rajendra Singh, the real brothers, have filed this appeal from their conviction and sentence to imprisonment for life and fine of Rs. 5000/- and in default of payment of fine to undergo R.I. for one year under Section 302/34 I.P.C.; R.I. for six months each under Section 504 I.P.C. and R.I. for two years each under Section 506 I.P.C., per judgment dated 17-6-2002 passed by Additional Sessions Judge/F.T.C., Kashipur, District Udham Singh Nagar, in sessions trial No. 331/2001.

2- Trilok Singh co-accused of the case was acquitted of the charges also levelled against him under all these three counts.

3- The facts of the case are that on 14-6-2001, Ram Singh deceased (hereinafter referred to as deceased), as usual went to his agricultural plot in Mohali jungle of P.S. Bazpur, District Udham Singh Nagar. Cattle belonging to accused Surendra Singh alias Bittu entered into the plot of the deceased. In the past also these cattle have damaged the crop in the plot of the deceased. The deceased made a complaint about it to accused Surendra Singh who did not take it nicely. At about 7.30 P.M. on that day accused Surendra Singh and his brother accused Rajendra Singh started abusing the deceased. The accused Rajendra Singh told his brother that the deceased create trouble everyday and therefore need to be killed. On this instigation accused Surendra Singh fired shot from his gun which hit the

deceased on the left flank of the abdomen causing him injury. At the time of the incident deceased's father Madan Singh and his other co-villagers Govind Singh and Kharak Singh were also there at the plot and they saw the occurrence. Accused gave them threat of dire consequences and fled away from there. When the deceased was being taken to hospital, he breathed his last.

4- Madan Singh, the father of the deceased, got scribed written report, Ext. Ka.1 and delivered it at Police Station, Bazpur at 9.45 P.M. the same day, that is, 14.6.2001 and on its basis check F.I.R., Ext. Ka.9 was drawn and case under Sections 302/34, 504, 506 I.P.C was registered against both these accused. The investigation of the case was taken up by Station Officer, S.I. Rakesh Chandra Thapliyal (P.W.4) . The inquest on the dead body of the deceased was held in the morning of 15.6.2001 where-after the dead body was sent for post mortem examination, which was performed the same day at 1.00 P.M. by Dr. S. Ahmad. The Investigating Officer attached the sample of the blood-stained and plain earth from the place of the incident vide memo, Ext. Ka.3 and prepared the site-plan, Ext. Ka.5 Accused Surendra Singh was arrested on 22.6.2001. However the gun wielded by him in the incident could not be recovered despite search. During the investigation involvement of Trilok Singh in the commission of the crime was alleged by the witnesses and on completion of the usual formalities of the investigation charge sheet, Ext. Ka.8 was submitted against these two accused and Trilok Singh on 17.8.2001 by second Investigating Officer S.I. I.D. Joshi. Defence taken in the statements by the accused was that they were innocent and were falsely implicated on account of animosity. Accused Surendra Singh also urged that informant and witnesses belong to same caste and they want the accused to leave their village and to settle elsewhere.

5- In order to bring home accusations to the accused, prosecution relied upon the evidence of six witnesses, including the two eye witnesses, informant Madan Singh (P.W.1) and Govind Singh (P.W.2). They supported the prosecution case by narrating the incident as disclosed in the F.I.R. of the case. witness Padam Singh (P.W.3) proved that the sample of the blood-stained and plain earth

was seized in his presence by the Investigating Officer vide memo, Ext. Ka.3 S.I. Rakesh Chandra Thapliyal (P.W.4) proved the investigation part of the case and whereas constable Rajendra Pal Singh (P.W.5) gave out that check F.I.R. was prepared on the basis of the written report of the informant and relevant entry in the General Diary, Ext. Ka.10 was also made by him regarding the registration of the case. Constable Mohan Chand (P.W.6) took the dead body of the deceased along with the relevant papers for post mortem. No evidence was adduced in defence.

6- The defence admitted the genuineness of the post mortem examination report, Ext. Ka.12 and, as per it, the autopsy surgeon detected following ante-mortem injury on the person of the deceased:

> Fire arm wound of entry 3cm x 2.5 cm x chest and abdominal cavity deep on the lower part of front of left side chest, 12cm below the nipple at 5 O'clock position. Margins of wound were inverted. Blackening and tattooing was present around the margins of the wound.

7- On internal examination 12th rib on left side was found fractured. Pleura on left side was lacerated and so was the left lung. Both the chambers of the heart were empty.

In the opinion of the medical officer the death was caused due to shock and haemorrhage as a result of fire arm injury about half of one day ago. It may be recalled that the post mortem examination was performed at 1.00 P.M. on 15.6.2001 and whereas the occurrence took place at about 7.30 P.M. on 14.6.2001.

8- Placing reliance on the evidence of the prosecution, the trial court accepted the prosecution case regarding the involvement of actual assailant accused Surendra Singh alias Bittu and accused Rajendra Singh, who instigated and exhorted his said brother to commit the crime and both of them were thus convicted and sentenced as aforesaid.

9- Learned counsel appearing on behalf of the accused submitted that the trial court failed to consider the important aspect that the Investigating Officer was alleged to have attached the sample of blood-stained and plain earth from the place where the alleged occurrence according to the two eye witnesses has not taken place

and that there were reasons to indicate that the place of the occurrence had been changed which was sufficient to show that the prosecution version about the involvement of the accused was not convincing. Learned counsel also argued that the interested testimony of the related witnesses was also shaky and discrepant in as much as the F.I.R. of the case do not indicate that the informant Madan Singh accompanied his son to the agricultural plot on the day of the occurrence and the other so called eye witness Govind Singh has had no reason to accompany the deceased to visit the agricultural plot at the time of the alleged incident. It was also submitted that accused Rajendra Singh was also falsely implicated assigning the minor role of instigation. Learned counsel also urged that at any rate it was not a case of culpable homicide amounting to murder and at the most the accused, who allegedly wielded the gun, could be convicted for an offence punishable under Section 304 part-II I.P.C.

10- Per contra, learned A.G.A. while supporting the judgment of the trial court, urged that the case against the accused was based on direct evidence and the testimony of both the eye witnesses being trustworthy, the accused were rightly held responsible for commission of the crime.

11- In the above backdrop we have to see as to whether the evidence of the prosecution is sufficient to prove beyond doubt that the deceased was fatally assaulted by the gun shot wielded by accused Surendra Singh alias Bittu and whether there is acceptable evidence to prove that there was meeting of mind among both the accused to commit the crime in question.

12- The fact that the death of deceased was homicidal was not at all disputed at the time of the argument on behalf of the accused. It was also not disputed that the deceased probably sustained fire arm injury at about 7.30 P.M. on 14.6.2001. This was the reason that the defence had admitted the genuineness of the post mortem examination report, Ext. Ka.12 and its formal proof was therefore dispensed with under Section 294 of the Code of Criminal Procedure. The place of the occurrence was however challenged and as stated above it was argued by the learned counsel appearing on behalf of the accused that similar contention was raised before the trial court which however has acted

upon the evidence of two eye witnesses, P.W.1, Madan Singh , P.W.2, Govind Singh and P.W.3, Padam Singh, the witness of attachment of samples of blood-stained and plain earth from the place of the occurrence by the Investigating Officer vide memo, Ext. Ka.3 to accept the place of occurrence as alleged by the prosecution. In this regard the evidence of P.W.4, S.I. Rakesh Chandra Thapliyal, the Investigating Officer of the case was also taken note of by the trial court. Having carefully considered their evidence it need to be stated at the outset that we find it difficult to see any merit in the submission of the learned counsel that the place of the occurrence has been changed by the prosecution.

13- The reason being that in the site-plan, Ext. Ka.4, the place of the occurrence was shown near the periphery (mend) between the agricultural plots of the accused and late Trilok Singh, the uncle of the deceased. The plot of the accused was shown in the north of the 'mend'. The actual place where the deceased was fired at was shown by letter 'B' at the 'mend' and there is definite statement of informant Madan Singh that when his son Ram Singh was fired at by accused Surendra Singh his son got hurt and fell in to his agricultural plot from its 'mend'. He also went on to state that near the place of the incident there were small poplar trees and in the west there were plots of Rai Sikh Mahendra Singh. In the site-plan the poplar trees were also shown and the house of said Mahendra Singh was shown in the west. Therefore, the informant has had no confusion about the actual place of the occurrence. It may also be noted that informant has also his land in the east of the place of the occurrence as was also shown in this site-plan and while the informant gave out that the occurrence took place on the 'mend' of his agricultural plot he was not referring to the other plot situate in the east adjacent to the pucca road running north-east. At the trial an attempt was made to create some confusion about the place of occurrence by reason of the agricultural plot situate in the south of the 'mend' shown as belonging to late Trilok Singh, the uncle of the deceased and in fact the informant had rightly claimed this plot as belonging to him and on the 'mend' of which the occurrence took place.

14- In regard to the place of the occurrence the evidence of eye witnesses Govind Singh is also definite and clear that the deceased on being hit by the fire arm shot fell in his agricultural plot situate in the south of the house of the accused. The house of the accused in the siteplan was also shown in the north of the mend of the two plots. It need to be stated there that the informant Madan Singh admitted that the eye witnesses belong to his caste. This was the reason that witness Govind Singh was suggested in cross-examination that he belong to the family of the deceased and on account of relationship this witness went on to state that the deceased on receiving the fire arm shot fell in his agricultural plot. However in the cross-examination he specifically gave out that the incident took place on the 'mend' of the plot of the deceased and naturally on receiving the fire arm injury the deceased fell in to his own agricultural plot situate in the south of the 'mend' between his own plot and that of the accused as stated above. Therefore, the evidence of this witness also being definite fix correctly the place of the occurrence as set up by the prosecution and there was no question of changing the place of the occurrence to show the presence of the witnesses at that site.

15- There can be no gain saying that the evidence of P.W.3, Padam Singh also lent credence to the above inference as he was also categorical in making the statement that the plot from where the samples of blood-stained and plain earth were attached in his presence by the investigating officer belong to deceased. He also gave out that another agricultural plot of the deceased was situate in the east of the place of the occurrence as also shown in the site-plan and as referred above. The evidence of the Investigating Officer, S.I. Rakesh Chandra Thapliyal also affirmed that from the place shown in the site-plan the samples of the blood-stained and plain earth were attached vide memo Ext. Ka.3 and this aspect of the matter settle the issue in the favour of the prosecution that the occurrence took place at point 'B' shown in the site-plan which is on the 'mend' between the two plots, on belonging to the informant and the other in the north belonging to the accused and that the place of the occurrence was not changed.

16- In this connection attention was also drawn to the report of the serologist , paper No. 15-A/3 which do not confirm that the blood on the sample of the earth was human to support the argument that this aspect of the matter belie the claim of the prosecution about the place of the occurrence. If the origin of the blood could not be confirmed on chemical analysis it would not mean that the otherwise reliable evidence as referred above would have to be kept out of reckoning on the question under consideration. The reason being that the expert evidence is only an opinion evidence which do not have the effect of conclusively displacing the direct reliable evidence in regard to a particular fact. Therefore, the serologist report was not carrying any adverse bearing and the trail court was also justified in placing reliance on the oral evidence in the case which proved beyond doubt that the occurrence took place at the place as alleged by the prosecution and that the place of the occurrence has not been changed in this case.

17- As regards the actual occurrence of assault is concerned, the positive case set up by the prosecution was that when the deceased made a complaint to accused Surendra Singh that accused's cattle have been damaging his crop the said accused and his brother Rajendra Singh started abusing the deceased and thereafter on the instigation of accused Rajendra Singh a gun shot was fired at the deceased by accused Surendra Singh as a result of which deceased sustained injury in the abdomen and fell then and there in to the agricultural plot. According to the prosecution at the time of the occurrence deceased was going to his agricultural plot from his village and that his father informant Madan Singh (P.W.1) and witness Govind Singh (P.W.2) and one Kharak Singh were also going along the 'mend' to the plot. Informant, Madan Singh was the last person following the deceased and other two witnesses Govind Singh and Kharak Singh. Both informant Madan Singh and Govind Singh in their evidence narrated the similar version and gave out that when Ram Singh who was ahead of all reached near the house of the accused both the accused, met him there on the 'mend' of the plots and at that time accused Surendra Singh was carrying a gun. The deceased made a complaint to the accused Surendra Singh about the

damage caused to his crop by the cattle of the accused whereupon uncomplimentary remarks and abuses were given to him and at the same time accused Rajendra Singh exhorted his brother accused Surendra Singh to kill the deceased. Accused Surendra Singh then fired a shot from the gun which hit the deceased on the left flank of the abdomen. They also gave out that deceased on sustaining the fire arm injury fell in the plot and when he was being taken from there to the village, he breathed his last. Both the witnesses were cross-examined at length but nothing of vital importance seems to have been elicited as may assail their credibility in regard to their basic version about the actual occurrence and manner of assault by the gun wielding accused Surendra Singh.

18- Drawing attention to the written report, Ext. Ka.1, learned counsel appearing on behalf of the accused argued that the recital of the report do not indicate that the informant Madan Singh was at the time of the occurrence following the deceased to go to his agricultural plot and that this aspect of the matter detract from placing reliance on the claim of the informant that he was there at the scene of the incident and saw the occurrence. We see no merit in this argument, because the version of the written report do not at all rule out the presence of the informant at the place of the occurrence. The written report does not give any indication that the informant eye witness got the report prepared on mere information of the incident carried to him by some one else. The recital of the report, therefore, clearly admit of the inference that the informant Madan Singh having seen the incident himself had the written report dictated as such to the scribe. It is specifically mentioned in the F.I.R. that the informant himself with the help of the other witnesses and village people brought his injured son from the place of the occurrence though the victim breathed his last in the way and could not be provided any medical aid. This recital also affirm that the informant Madan Singh was at the scene of the incident and saw the occurrence as proved by his definite and cogent evidence.

19- To discredit his testimony it was then argued that if the informant was there at the scene of the incident and took his injured son to the village with the help of the villagers from the scene of

the incident, his cloths should have been stained with blood and this piece of evidence would have affirmed his presence at the scene of the occurrence but such evidence was not adduced in the case by the prosecution. It appear that the cloths of the informant were not attached by the investigation officer and his remissness in this matter shall have no adverse effect on the otherwise reliable evidence of the informant- eye witness.

20- Learned counsel for the accused also referred to the statement of P.W.2, Govind Singh who gave out that informant Madan Singh was the last person following the deceased and others and at the time of the occurrence the informant was behind him at a distance of about 15-20 paces and submitted that it was highly improbable that informant Madan Singh would have been able to witness the actual occurrence of assault from such a long distance particularly at about 7.30P.M. when it normally becomes dark. The incident took place in the month of June when sun sets much after 7.00 P.M. and therefore there remain sufficient brightness of the day till 7.30 P.M. during those days and not only the informant Madan Singh but other witness have had no difficulty in fixing the identity of the assailant of the deceased. In other words the submission of the learned counsel in that regard also carry no conviction and the evidence of the informant eye witness. Madan Singh can not be viewed with any suspicion and doubt.

21- To assail the credibility of the evidence of eye witness Govind Singh, learned counsel argued that this witness has had no occasion to accompany the deceased on that day, particularly when the witness himself has not shown any specific reason to go to that side where the plot of the deceased was situate and that in the totality of the circumstances of the case the evidence of this witness should not have been relied upon by the trial court. It has been stated above that this witness belong to the caste of the deceased and was distantly related to him. This was the reason that a suggestion to this effect was also given to the witness that he deposed falsely in the case on account of being the member of the family of the informant. The witness refuted the suggestion but the evidence of the informant Madan Singh itself indicated that this witness was distantly related to him and they

belong to same family. If on account of this closeness the witness then accompanied the deceased to the agricultural plot, there was nothing unusual in it because members of the family and those having close acquaintance keep company while going to their agricultural plot to have a look and take case of the standing crop. In the face of these facts the only legal requirement is that the evidence of such witness need to be acted upon only if on cautious and close scrutiny evidence appear credible and trustworthy. There can be no gain saying that there is nothing in the cross-examination of the witness as may indicate that he is not the truthful witness and made himself available as a witness of the occurrence only on account of mere relationship or acquaintance with the deceased. Similar reasoning also holds good in relation to the informant Madan Singh whose evidence also on close scrutiny is found reliable. Consequently the decision of the Apex Court in the case of Harjinder Singh @ Bhola versus State of Punjab; 2004(5) Supreme 578 pressed in to service by the learned counsel for the accused can not be taken to support his argument. The reason being that in the case before the Apex Court the evidence of P.W.3 and P.W.4, who were close relations and were said to be the chance witnesses, was not found reliable on cautions and close scrutiny and the principle laid down in the reported decision was that the evidence of such witnesses should be approached with cautious and close scrutiny to assess their credibility. We have scrutinized and reappraised and evidence of both these eye witnesses of the instant case with care and caution and consequent thereto we come to a definite conclusion that their evidence being cogent and definite is convincing and reliable and worth placing reliance thereupon towards proof of the case of the prosecution about the manner of assault by the gun wielding accused Surendra Singh alias Bittu.

22- The prosecution case was also sought to be disbelieved by the learned counsel for the accused on the ground of non-production of eye witness Kharak Singh nominated in the written report on the premise that the prosecution deliberately withheld this witness and preferred to place reliance only on the evidence of relations of the deceased. We see no merit in this argument also because the law does not require that any particular number of the witnesses have to be

examined to prove the case of the prosecution. The law is that the quality and not the quantity of the evidence matters and since the evidence of both the eye witnesses examined is credible and reliable, the plea that there is no independent witness is of no consequence.

23- Learned counsel then submitted that the gun said to have been wielded by the accused Surendra Singh in the occurrence was not recovered from the accused and this aspect of the matter create a suspicion in the claim of the prosecution. We have the evidence of Investigating Officer, P.W.4 who gave out that during investigation he could not collect the documentary evidence that the gun wielded by the accused was a licensed gun and further that despite attempts and search no gun could be recovered from near the place of the occurrence. Search memos, Ext. Ka.5 and Ext. Ka.6 were then prepared on 29-6-2001 and 30-6-2001 to indicate that the efforts of search of the weapon proved futile. The cross-examination of the investigation officer do not indicate that the efforts made by him were not sincere. Therefore, in these circumstances non-recovery of the gun does not detract from the case of the prosecution particularly when the direct evidence of the two eye witnesses prove the actual occurrence and the manner in which the accused Surendra Singh alias Bittu fired shot from gun which hit the deceased who succumbed to his injury soon thereafter on way to the hospital.

24- It was also submitted that the investigating officer has not shown the crop of the informant or the deceased damaged by the cattle of the accused and therefore motive aspect of the case was not established. It was then submitted that at any rate the motive alleged was weak and it was not probable that on mere complaint of damage of crop the accused would have resorted to wield fire arm to fatally assault the deceased as alleged by the prosecution. The argument also carry no conviction because it was not excepted to show in the site-plan the damage crop of the deceased particularly when there were instances of damage to crop by the cattle in the past also. No doubt no report was earlier lodged by the informant or the deceased about the damage to crop but this inaction can also not be taken to detract from the positive case of the prosecution as set up and proved by the direct evidence of the witnesses examined in the case.

25- Learned counsel of the accused then submitted that at any rate the evidence in the case do not prove that accused Rajendra Singh was in any way involved in the commission of the crime and further that the offence committed by the accused Surendra Singh can only be said to be culpable homicide not amounting to murder. Learned counsel submitted that no overt act was assigned to accused Rajendra Singh and he was falsely roped in by assigned him the role of exhortation. It was also submitted that it was not a case in which the two accused had come prepared to kill the deceased because according to the case of the prosecution itself the occurrence took place all of a sudden while the deceased was going to his plot and he happened to make a complaint to accused Rajendra Singh regarding the damage to the crop by the cattle of the accused. Learned A.G.A. controverted the submission made on behalf of the accused and argued that for applying section 34 of the Indian Penal Code it is not necessary to show some overt act on the part of the accused and the liability to commit the offence arises it the criminal act was done in furtherance of the common intention of the person who joined in committing the crime. To bring home his point of view learned counsel placed reliance on the decision of the Apex Court in the matter of Girija Shankar versus State of U.P. (2004) 3 Supreme Court Cases 793 and another decision in the matter of Hari Ram versus State of U.P.; J.T. 2004(6) S.C. 331.

26- Having gone through the facts of the case and the above reported decisions we are convinced that the facts of the reported cases were at variance and the ratio of the decisions can not be taken to controvert the argument of the learned counsel for the accused. It may be noted that in the first mentioned reported case all the arraigned accused of the case were assigned overt acts and number of injuries were sustained by the victim which were attributable to the accused persons of the case who were found to have common intention to make an attempt to commit the murder of the victim and they were therefore held liable to committing offence under Section 307 read with Section 34 I.P.C. In the second mentioned reported case also the accused was saddled with the liability with the aid of section 34 I.P.C. on account of his having threatened the witnesses by pointing a pistol

towards them and asking them to go back from that place. On the other hand we find that in the instant case there was only allegation of instigation attributed to accused Rajendra Singh and he was not in the picture when the deceased first of all met the accused Surendra Singh and complained to him about the damage to his crop by the cattle of the accused. The accused Surendra Singh was at that time carrying a gun and therefore there was no need for accused Rajendra Singh to exhort or instigate his brother accused Surendra Singh to kill the deceased by wielding the gun. Considering the evidence of P.W.1 and P.W.2 to this effect we are convinced that there was no meeting of mind of these two accused to commit the offence with which they were charged and therefore without casting any reflection on the evidence of these two eye witnesses and only by way of abundant caution accused Rajendra Singh should have been extended benefit of doubt and acquitted of the charges levelled with the aid of section 34 I.P.C. Therefore, we deem it just and proper to extend benefit of doubt to accused Rajendra Singh who need to be held not guilty and to be acquitted of the charges levelled against him.

27- So far as the question as to what offence was committed by accused Surendra Singh, it need to be stated that the learned counsel for the accused pressed in to service following reported decisions of the Apex Court in support of the argument that since it was a case in which only one gun shot was fired the case of the accused Surendra Singh fall in the category of culpable homicide not amounting to murder:

(1) Shankar Narayan Bhadolkar vs. State of Maharashtra; 2004 A.I.R. SCW 1511.

(2) Sukhdev Singh vs. Delhi State (Govt. of NCT of Delhi); 2003 AIR SCW 4228.

(3) Raj Kishore Jha Vs. State of Bihar and others; 2003 AIR SCW 5995.

(4) Manke Ram vs. State of Haryana; 2003 SAR (Criminal) 384 Supreme Court.

28- Having gone through the reported decisions, we find that none of these decisions apply to the facts of the case. In the first mentioned case the accused who was charged for causing the death had taken the

plea that by accident the gun got fired when in the scuffle the deceased pulled the barrel of the gun. This aspect of the matter was considered and case was held to fall under the category of culpable homicide not amounting to murder. In the second reported case of Sukhdev Singh appellant took out his pistol during the course of scuffle and fired at the deceased. In the instant case there was no scuffle and the deceased had merely made a complaint to accused Surendra Singh regarding damage to his crop by the cattle of the accused and the accused then did not take the complaint in proper spirit and resorted to wield the gun against the deceased. In the reported case of Raj Kishore Jha the gun shot was fired from a considerable distance of about 70 to 80 feet and this aspect of the matter was considered in coming to the conclusion that on the facts of the case the offence fall in the category of culpable homicide not amounting to murder. In the last above mentioned case of Manke Ram the appellant and the deceased were the police personnel and both were having a liquor drinking session at the quarter of the appellant. By some reason appellant was enraged and after abusing the deceased took out his service revolver and fired two shots at the deceased who fell down and succumbed to the injuries. It was therefore found that it was a sudden fight in the heat of passion and the appellant took no undue advantage in causing the fire arm injuries to the deceased. Under these circumstances the appellant was held to have committed an offence under Section 304 Part-II I.P.C. There can be no gain saying that the facts of the instant case are at variance and it was not a case of sudden fight in the heat of passion.

29- In the fact of the facts of the case we find it advantageous to refer to a latest decision of the Apex Court in the matter of Thangaiya vs. State of T.N.; 2005 Supreme Court Cases (Cri) 1284. The Hon'ble Judges of the court in this case succinctly explained the points of distinction between the two offences one under Section 299 I.P.C. and the other under Section 300 I.P.C. It was also finally observed that – "it cannot be said as a rule of universal application that whenever one blow is given, Section 302 I.P.C. is ruled out. It would depend upon the facts of each case. The weapon used, size of the weapon, place where the assault took place, background facts leading to the assault,

part of the body where the blow was given, are some of the factors to be considered." Having considered the background facts of the case it is immaterial in this case that only one gun shot was fired at the deceased by the accused Surendra Singh. It is important that he resorted to wield the gun on a mere complaint of damage of crop by cattle made to him by the deceased. The shot was fired from close range as is evident from the medical evidence and the part of the body selected to fired at was the abdomen close to left side of the chest, the vital part of the body. Under these circumstances it can safely be held that the shot was fired by this accused with the intention of causing bodily injury sufficient in the ordinary course of nature to cause the death falling under clause- thirdly of Section 300 I.P.C. as clearly distinguishable from the corresponding clause (b) of Section 299 I.P.C. where the words used are "causing such bodily injury likely to cause death". Therefore, we are convinced that the case of the accused Surendra Singh is squarely covered by clause- thirdly of Section 300 I.P.C. and he was rightly held guilty of committing the murder punishable under Section 302 I.P.C.

30- The trial court also considered in proper perspective the evidence of eye witnesses to conclude that the accused also committed the offences punishable under Sections 504 and 506 I.P.C. in view of the accused having intentionally insulted by using abusive language against the deceased and also having criminally intimidated the deceased and the witnesses who were threatened with dire consequences and were told to leave the place of the occurrence with the injured victim at that time.

31- Upon re-appreciation of the evidence on record and in view of the discussion made above, the accused Rajendra Singh is entitled to be acquitted of the charges levelled against him and whereas the conviction and sentence awarded against the accused Surendra Singh alias Bittu under Sections 302 I.P.C. simplicter and Sections 504 and 506 I.P.C., are fit to be affirmed.

32- In the aforesaid premise the appeal succeed partly, which are direct. The accused Rajendra Singh is acquitted of the charges under Sections 302/34 I.P.C.; 504 I.P.C. and 506 I.P.C. He is on bail. His

bail bonds are cancelled and sureties are discharged. Fine, if deposited, shall be refunded to him.

32- Conviction and sentence of imprisonment for life and fine of Rs.5000/- and in default of payment of fine to undergo further R.I. for one year under Section 302 I.P.C.; six months R.I. under Section 504 I.P.C. and two years R.I. under Section 506 I.P.C. against the accused Surendra Singh are affirmed. The sentences shall run concurrently. The accused Surendra Singh is in jail. He shall serve out the sentences awarded.

33- Let the record be transmitted to the trial court.

(B.S. Verma, J.) **(Irshad Hussain, J.)**

ISB